

Lai Poh See v Goon Choy Fook @ Yoon Choy Fook

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22NCVC-16
OF 2010

PRASAD ABRAHAM JC
8 AUGUST 2011

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Contract — Estoppel — Estoppel by conduct — Whether there was unconscientious use of power to transfer property — Whether plaintiff could claim fraud against defendant despite relying solely on plaintiff's companion who handled all transactions related to property

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Contract — Misrepresentation — Fraudulent misrepresentation — Sale and purchase of property — Whether claim of fraud by plaintiff suffice to set aside sale and purchase

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The plaintiff entered into a relationship with a man whom she called 'Hubby' despite knowing that he was a married man. The plaintiff submitted that 'Hubby' purchased a property and he paid the monthly instalments. The plaintiff left all matters pertaining to the property to 'Hubby'. The plaintiff submitted further that to ensure she would not leave 'Hubby' or disposed the property she agreed to 'Hubby's' request to sign certain transfer forms and several sheets of blank paper. However, an advocate and solicitor ('DW3') who presented the documents denied the plaintiff signed blank papers. The plaintiff sought to seek to set aside the interest of the defendant as the registered owner of the property arguing that the transfer of the property to the defendant was tainted with fraud. Hence, the registration of the defendant as the registered owner of the property should be set aside in accordance to s 340 of the National Land Code. This was denied by the defendant.

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Held, dismissing the claim and the counterclaim:

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- (1) The plaintiff who accepted 'Hubby' not knowing his identity and left the affairs of the property to him, did not seriously challenge the signature on the documents. There was also no issue of the defendant's unconscientious use of power on the plaintiff as the plaintiff relied purely on 'Hubby'. Hence the plaintiff should be estopped from raising the issue of fraud because of her own conduct. *Teh Poh Wan v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 referred (see para 8(a) & (b)).
- (2) Since the plaintiff asserts the transfer of the property was tainted by fraud, the best person to explain the whole transaction would have been

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A 'Hubby' but the plaintiff failed to at the very least subpoenaed 'Hubby' to give evidence. The presumption under s 114(g) of the Evidence Act 1950 should apply (see para 8(d)).

B (3) As all representation made by the plaintiff were from 'Hubby', there was no statement of fraud by the defendant. 'Hubby' acted as the beneficial owner of the property and as a fact the plaintiff consented and willingly adhered to whatever 'Hubby' said. This was stated in the plaintiff's own evidence (see para 8(e)).

C **[Bahasa Malaysia summary]**

D Plaintiff menjalin hubungan dengan lelaki yang dipanggilnya 'Hubby' meskipun dia mengetahui yang lelaki tersebut sudah berkahwin. Plaintiff berhujah bahawa 'Hubby' membeli hartanah dan dia membayar bayaran ansuran bulanan. Plaintiff melepaskan kesemua perkara berkaitan hartanah tersebut kepada 'Hubby'. Plaintiff selanjutnya berhujah bahawa untuk memastikan dia tidak meninggalkan 'Hubby' atau menjual hartanah tersebut dia bersetuju dengan permintaan 'Hubby' untuk menandatangani borang-borang pemindahan tertentu dan beberapa keping kertas kosong. Walau bagaimanapun, peguambela dan peguamcara ('DW3') yang E mengemukakan dokumen-dokumen tersebut menafikan yang plaintiff menandatangani kertas-kertas kosong. Plaintiff memohon untuk mengetepikan kepentingan defendan sebagai pemilik berdaftar hartanah tersebut dengan menghujahkan bahawa pemindahan hartanah tersebut kepada defendan dicela dengan fraud. Maka, pendaftaran defendan sebagai pemilik F berdaftar patut diketepikan berikutan s 340 Kanun Tanah Negara. Ini dinafikan oleh defendan.

Diputuskan, menolak tuntutan dan tuntutan balas:

G (1) Plaintiff yang menerima 'Hubby' tanpa mengetahui identitinya dan membiarkan urusan-urusan hartanah kepadanya, tidak dengan serius mencabar tandatangan di atas dokumen-dokumen tersebut. Juga tidak terdapat isu mengenai penggunaan kuasa jujur defendan ke atas plaintiff memandangkan plaintiff hanya semata-mata bergantung ke atas 'Hubby'. Maka plaintiff patut diestop daripada membangkitkan isu fraud kerana H tingkah lakunya sendiri. *Teh Poh Wan v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 dirujuk (lihat perenggan 8(a) & (b)).

I (2) Memandangkan plaintiff menegaskan pemindahan hartanah dicela oleh fraud, orang terbaik untuk menjelaskan transaksi keseluruhannya adalah 'Hubby' tetapi plaintiff gagal sekurang-kurangnya menyampaikan sepina kepada 'Hubby' untuk memberi keterangan. Anggapan di bawah s 114(g) Akta Keterangan 1950 patut terpakai (lihat perenggan 8(d)).

(3) Memandangkan kesemua representasi yang dibuat oleh plaintiff adalah daripada 'Hubby', tiada pernyataan fraud oleh defendan. 'Hubby'

bertindak sebagai pemilik benefisiari hartanah dan sebagai fakta plaintiff bersetuju dan sanggup mengikut apa-apa yang dikatakan oleh 'Hubby'. Ini dinyatakan di dalam keterangan plaintiff sendiri (lihat perenggan 8(e)).]

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Notes

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For cases on estoppel by conduct, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4227–4243.

For cases on fraudulent misrepresentation, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5212–5231.

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Cases referred to

Loi Hieng Chiong v Kon Tek Shin [1983] 1 MLJ 31, FC (refd)

Teh Poh Wan v Seremban Securities Sdn Bhd [1996] 1 MLJ 701; [1996] 4 CLJ 16, CA (refd)

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Legislation referred to

Evidence Act 1950 s 114(g)

National Land Code s 340

ET Low (Cheong Wai Meng & Van Buerle) for the plaintiff.

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KK Loong (Wong & Chua) for the defendant.

Prasad Abraham JC:

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[1] The plaintiff's case is to set aside and defeat the interest of the defendant as a registered owner of land held under Pajakan Negeri No Pendaftaran 3992, No Lot 99753, Mukim Hulu Kinta, Daerah Kinta, Negeri Perak Darul Ridzuan and situated on the same a double storey semi detached house ('the said property'). The plaintiff contends that the plaintiff had bought the same from one Syarikat Sri Puspa Sdn Bhd (No Syarikat 45038-X) and the transfer of the said property to the defendant was tainted with fraud and therefore the registration of the defendant as the registered owner of the said property should be set aside pursuant to s 340 of the National Land Code. The defendant denies and takes issue on the same.

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BACKGROUND FACTS

[2] To really appreciate the state of mind of the plaintiff and why this impugned transaction came about, the facts have to be looked at in depth. In early 1999, the plaintiff entered into a relationship with a gentleman whom she only knew as 'Hubby'. The plaintiff as she put it had a 'de facto' relationship of husband and wife, although she was aware he was married to somebody else. In short the 'plaintiff' was 'Hubby's' mistress. The bizarre aspect of this

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- A relationship was the plaintiff did not ask nor knew 'Hubby's' full name. Even when pregnant with his child and subsequently having delivered the child, the plaintiff admitted in cross-examination that the registration of the child was done fairly surreptitiously '(See page 4 & 5 of Notes of Evidence)'. This was how bizarre the relationship was. The plaintiff was prepared to accept the
- B relationship on these terms.

- [3] With regards to the said property it is clear from the evidence that the plaintiff did not pay for the purchase of the said property but took a loan from RHB Bank Bhd and all the monthly installments were paid by 'Hubby' (see Q8 and the answer therein the plaintiff's witness statement marked WSPW1). It can be seen from the type of relationship between 'Hubby' and the plaintiff, as long as the plaintiff was provided for by hubby, the plaintiff did not really care about the said property and left all dealings in connection with the same to hubby.

D THE IMPUGNED TRANSFER

- [4] According to the plaintiff in 2005, hubby wanted to discharge the said property from RHB Bank. Hubby requested the plaintiff to sign a few documents to ensure the plaintiff will not dispose of the said property or leave him after the said property had been discharged. The plaintiff agreed and followed hubby to a lawyer's office and signed the documents presented by Kiew Lai Wah ('DW3'). The plaintiff willingly signed the transfer although the plaintiff now claims she did not realise what she was signing and that she signed the papers in blank. The plaintiff evidence-in-chief in Q 11, 12, 13, 14, and 15 are most instructive to understand the state of mind of the plaintiff.

- Q11: Apakah jawapan anda terhadap permintaan Hubby tersebut?
- G Memandangkan saya langsung tidak mempunyai sebarang niat untuk melupuskan dan/atau mengadaikan Hartanah tersebut setelah segala pinjaman perumahan dijelaskan, saya telah bersetuju dengan permintaan Hubby tersebut.
- H Selanjutnya mamandangkan Hubby yang menanggung segala kos pembelian Hartanah tersebut, maka saya berpendapat bahawa adalah wajar bagi Hubby untuk mendapatkan komitmen saya bahawa saya tidak akan melupuskan dan/atau mengadaikan Hartanah tersebut setelah segala pinjaman perumahan bank dijelaskan.

- Q12: Apakah yang berlaku selepas itu?
- I Pada atau sekitar akhir tahun 2005, saya telah mengikut Hubby pergi ke sebuah firma guaman yang mana saya tidak ingat nama firma guaman tersebut. Di situ, seorang peguam yang mengendalikan perkara ini telah memperkenalkan dirinya sebagai Kiew Lai Wah kepada saya (selepas ini dirujuk sebagai 'Firma Guaman KLW'). Di situ saya telah menandatangani beberapa borang-borang kosong serta kertas-kertas kosong. Selepas itu, saya pun beredar. Saya hanya berada di firma tersebut lebih kurang 10 minit sahaja.

Q13: Apakah jenis borang-borang kosong yang anda tandatangani?

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Saya tidak ingat. Selanjutnya, borang-borang kosong tersebut langsung tidak diisikan dengan penuh.

Q14: Mengapakah anda menandatangani borang-borang dan kertas kosong?

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Pada pendapat saya, borang-borang kosong serta kertas-kertas kosong tersebut adalah diperlukan bagi memenuhi permintaan Hubby iaitu untuk mengelakkan saya daripada melupuskan Hartanah tersebut dan/atau mengadaikan Hartanah tersebut setelah segala pinjaman perumahan dijelaskan. Dalam kata lain, sebagai sekuriti kepada Hubby bahawa saya tidak akan melupuskan dan/atau mengadaikan Hartanah tersebut setelah segala pinjaman perumahan dijelaskan.

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Q15: Apakah yang mendorong anda untuk berpendapat sedemikian?

Saya amat mempercayai Hubby. Selain daripada Hartanah tersebut, Hubby juga ada membelikan hadiah-hadiah mahal kepada saya. Jadi saya amat percaya bahawa Hubby tidak akan menipu saya. (*Malahan, selepas insiden ini, Hubby juga ada membelikan hartanah-hartanah lain kepada saya*).

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[5] After the discharge of charge, the document of title was never in the possession of the plaintiff. DW3 confirmed that the plaintiff did not sign any of the documents in blank and I have no reason to doubt the testimony of an advocate and solicitor of the High Court. The evidence of the defendant DW1 evidence is also very illustrative as to what actually happened. I refer to the evidence-in-chief of DW1. It is important to note that for the first time the identify of 'Hubby' is disclosed and the close relationship between 'Hubby' and DW1.

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Q5: If you did not know her how it is that you are able to purchase the property from her?

I know of this man whose name is Yeoh Kok Wah @ Yong Ah Ku ('Yeoh'). We have been good friends since our working days in the seventies. As a good friend I am asked to take care of some of his personal matters and that includes taking care of his son from his previous marriage who is psychotic. I also gave him leads and contacts for share investment. Sometime in the early 2002 I gave him a lead in the MISC shares which he bought and make a lot of money when he sold in 2004. He agreed to pay me commission for the profit he made in the MISC shares. He also invested in other shares from my leads and made some money. Between the year 2002 to 2005 he owes me some RM200,000.00 as commission from the profit he made from the shares he invested. Sometimes in October 2005 he told me that he has a property in Ipoh which he has bought but registered in the name of his girlfriend by the name of Lai Poh See. According to Yeoh the property is bought in the year 1999 by him from the money he remitted to Lai which according to him was HKD 350,000.00. He explained to me that he has to arrange for the payment in Hongkong dollars instead of Ringgit Malaysia to cover his tracks. He told me he can arrange for the SPA to be signed by Lai and me.

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- A** Q8: Did Yeoh arrange for the Sale & Purchase Agreement to be signed between Lai Poh See and you?
- Yeoh told me that he will bring me to see a lawyer by the name of Mah Kim Mun to arrange for the SPA to be prepared and signed. He told me the SPA would be for RM270,000.00 and a sum of RM198,000.00 which he has partially paid to
- B** Lai Poh See from Ringgit Malaysia equivalent of HKD 350,000.00 would be treated as amount already paid which is to set off the sum of about RM200,000.00 which he owed to me.
- Q9: Did Yeoh bring you to meet with the lawyer Mah Kim Mun?
- C** Yes, sometimes at the beginning of Nov 2005 we went to the legal firm of Meng & Associates at No. 42, 2nd Floor, Jalan 52/4, 46200 Petaling Jaya to meet the lawyer Mah Kim Mun. Yeoh instructed Mah to prepare the SPA with the following main terms:
- (a) Purchase price be RM270,000.00
- D** (b) Sum of RM198,000.00 to be treated as received by him and balance purchase price of RM72,000.00 to be paid within six (6) months.
- Yeoh told Mah that the registered owner is his girlfriend Lai Poh See and he instructed Mah to prepare the SPA with Lai Poh See as the vendor. He gave a copy of the document of title to Mah and told him that the property is charged to RHB Bank Bhd and I will have to use the balance purchase price to pay the redemption sum to redeem the property from the bank.
- E** Q19: Can you explain to the court what happen after the signing of the documents?
- F** Mah explained to myself and Yeoh that he only acts for me and since Lai Poh See is not represented she will need to consult another Solicitors on the terms and thereafter to sign the documents. Yeoh then took the documents which I have signed from Mah and told Mah that he will bring Lai Poh See to see another lawyer for consultation and execute the documents which I have signed.
- Q20: Did you at anytime sign any blank documents
- G** No I will never do that. Whatever I signed is all the documents prepared by Mah and explained to me by Mah.
- Q21: Refer to page 18 of Statement of Claim the Plaintiff has pleaded at paragraph 49(b) that you have forged the signature of the Plaintiff in the SPA in that true?
- H** It is a lie because all the documents which I have signed was in the presence of Mah and Mah's lawyer and I only signed in the column which is meant for me to sign.
- Q32: When was the last time you met Yeoh?
- I** Sometime in the middle of the year 2008 I was informed that Yeoh suffered a stroke and was unable to move and speak fluently. In the month of September 2008 I managed to track him down in the Sunway Hospital, I visited him twice in the Hospital and I noted that he was bed-ridden and not able to speak well. It was during the last visit in September 2008 he told me to proceed with the transfer.

[6] The defendant DW1 under intense cross-examination clearly affirms that the sales and purchase agreement entered into between the plaintiff and the defendant for the said property was to secure monies owed to DW1 by hubby and subsequently when DW1 visited hubby in hospital when hubby was seriously ill, hubby told him to proceed with the transfer which DW1 did hence this suit before the court.

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THE LAW

[7] I refer to the decision of the Federal Court in *Loi Hieng Chiong v Kon Tek Shin* reported in [1983] 1 MLJ 31, I particularly the judgment of Syed Othman FJ at p 35 onwards para H left hand column:

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As regards the law, it has been said that the courts have so far not ventured to lay down as a general proposition what amounts to fraud. It can only be determined from acts and circumstances of a particular case. It usually takes the form of a statement of what is false or a suppression of what is true. *Where the relative position of the parties is such as raises the presumption of an unconscientious use of power arising out of the circumstances and conditions, the transaction cannot stand unless the person claiming benefit of it is able to repel the presumption by contrary evidence proving to have been in point of fact, fair, just and reasonable per Lord Selborne LC in Earl of Aylesford v Morris, see also Fry v Lane.*

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In *Deny v Peek* it was held that to establish fraud it is necessary to prove the absence of a honest belief in the truth of that which has been stated; in the words of Lord Herschell 'Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly, careless whether it be true or false'.

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In *Assets Company Ltd v Mere Roihi & Ors* s 55 of the New Zealand Land Transfer Act 1885 provides in effect that the register is conclusive evidence of the title of the registered proprietor, except in cases of fraud, prior certificates of title ... etc. Lord Lindley at p 210 said:

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'Fraud in these actions' (ie actions seeking to affect a registered title) 'means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud'.

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In *Waimiha Sawmilling Company Ltd v Waione Timber Company Ltd* Lord Buck-maser, after citing the above passage, said at pp 106–7:

If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear.

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The words appearing in the latter case and which read causing an interest not to be registered and thus fraudulently keeping the register clear' merely illustrate the effect of fraud. From these two authorities, fraud must be actual. There must be dishonesty of

- A some sort. Fraud may be established if the designed object of a transfer is to cheat a man of a known existing right; or where by a deliberate and dishonest act a person loses an existing right.
- B [8] Bearing the law in mind, the court took the following pieces of evidence into account:
- C (a) the plaintiff was prepared to live with 'Hubby' and was prepared to accept not knowing his identity and left the affairs of the said property to hubby. The plaintiff agreed to go to DW3 office and sign all the documents that were presented to plaintiff to give a sense of security to hubby that the plaintiff would not dispose of the property or leave hubby after the said property had been discharged. The court also notes that plaintiff did not seriously challenge her signature on the documents;
- D (b) there was no question of the defendant's unconscientious use of power on the plaintiff as the plaintiff relied purely on 'Hubby'. The plaintiff was in my view not perturbed to sign whatever 'Hubby' requested of her because in the plaintiff's own evidence, hubby had lavished the plaintiff with expensive gifts and bought other property for the plaintiff, so what hubby wanted to do with the said property did not really matter to her. The plaintiff should now be estopped from raising the issue of fraud because of her own conduct. See *Teh Poh Wan v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701; [1996] 4 CLJ 17, a decision of the Court of Appeal where His Lordship Gopal Sri Ram JCA, in the judgment of the court held:
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- F (1) The instant appeal could be satisfactorily resolved by reference to the doctrine of estoppel. Through her actions, the appellant would have led a reasonable man to believe that she had given her husband a carte blanche to act on her behalf. The undisputed facts reasonable support an inference that the respondent was influenced by the conduct of the appellant to entertain such a belief. It would, therefore, be unjust and inequitable to suffer the appellant to assert facts that would now contradict her earlier conduct. It was no answer for the appellant to say that she had no actually authorised the husband to enter into the contract using her name.
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- H Per curiam:
- I (1) The doctrine of *estoppel* is a flexible one by which the courts seek to do essential justice between litigating parties. Indeed, the circumstances in which the doctrine may operate are endless. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice.
- (2) It is wrong to apply the maxim that 'estoppel may be used as a shield but not a sword' to limit the availability of the doctrine to defendants alone. The plaintiffs, too, may have recourse to it.
- (c) the court finds the plaintiff now choses to take the stand that the

plaintiff's transfer of the said property to the defendant was tainted with fraud is when the plaintiff realised that contact with hubby had been severed and the relationship between the plaintiff and hubby had also been severed. It is to be noted even after receiving the letter of demand from solicitors for the defendant the plaintiff failed to respond, and her evidence was that was the plaintiff was awaiting instructions from hubby;

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- (d) hubby played a pivotal at role in the entire transaction and yet was not subpoenaed to give evidence. Since the plaintiff is asserting the transfer of the said property is tainted by fraud, the best person to explain away the whole transaction would have been 'Hubby' yet the plaintiff failed to at the very least subpoenaed hubby to give evidence. The presumption under s 114(g) of the Evidence Act 1950 should apply (see *Evidence Practice and Procedure* (2nd Ed), by Augustine Paul at p 794); and

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- (e) I considered the points raised in rather efficient and tenacious cross-examination of the defendant's witnesses by counsel for the plaintiff. I am of the view, that as all representations made to the plaintiff were by 'Hubby', where is the statement of fraud by the defendant hubby acted as the beneficial owner of the said property and I find as a fact the plaintiff consented and willingly adhered to whatever hubby said and the plaintiff's own evidence bears that out.

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[9] For all the above reasons I found the transfer of the said property by the plaintiff to the defendant to be valid and the court dismissed the plaintiff's claim in the main.

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[10] The court found the defendant was well aware of the position of the plaintiff and that the plaintiff occupied the said property and whilst the court may have negated a finding of fraud, the plaintiff has been left high and dry by hubby and for these reasons I made orders for assessment of damages that the plaintiff may have suffered before delivery up of vacant possession. The plaintiff has made out a case *in personam* against the defendant see *National Code a Commentary* (2nd Ed), Judith Sihombing at pp 797–799. The court also dismissed the defendant counterclaim with costs as the issue of rentals could only have been corroborated by hubby who was not subpoenaed to testify.

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[11] For all aforesaid reasons I made the orders that I made on 18 May 2011. *Claim and counterclaim dismissed.*

Reported by Mashrifah Ravendran

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